



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** FKW Incorporated Systems

**File:** B-235228

**Date:** July 11, 1989

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### **DIGEST**

Agency determination that it could not expect to receive offers from two responsible small business concerns, based solely on outdated information regarding a solicitation issued 4 years ago, and therefore not to set the procurement aside for small business, was an abuse of discretion where 14 small business concerns responded to the Commerce Business Daily synopsis of the procurement.

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### **DECISION**

FKW Incorporated Systems protests a determination by the Food and Drug Administration (FDA) not to set aside for exclusive small business competition request for proposals (RFP) No. 222-89-2001 for the operation and maintenance of facilities at the National Center for Toxicological Research, Arkansas. FKW contends that the contracting officer had sufficient expectation of small business interest to require a set-aside.

We sustain the protest.

As a preliminary matter, an acquisition of services, such as here, is to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price. Federal Acquisition Regulation (FAR) § 19.502-2 (FAC 84-40). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. Universal Hydraulics, Inc., B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417.

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FDA reports that the prior solicitation for these services was issued in March 1985. The earlier solicitation was issued on an unrestricted basis and responses were only received from three large businesses, one of which was determined to be technically unacceptable. Prior to issuing the current solicitation, the contracting officer, relying solely on the 4-year old information regarding the earlier solicitation, determined that there was no reasonable expectation that offers from at least two responsible small business firms would be received and that award would be made at a reasonable price. He therefore issued this RFP on an unrestricted basis. This decision was concurred in by the FDA small business utilization specialist.

The record shows, however, that before issuing the solicitation, FDA published a synopsis in the Commerce Business Daily (CBD) on December 20, 1988, to announce the procurement. Fourteen of the 50 firms responding to the CBD notice indicated that they were small businesses. The RFP was issued on March 7, 1989, with an original closing date for receipt of proposals of April 6, 1989.<sup>1/</sup> On March 9 and 10, two small business firms, FKW and J&J Maintenance, contacted the agency and asked if the requirement was a set-aside and were advised that it was not. On March 22, three of nine firms that attended the pre-proposal conference were small business firms. During the pre-proposal conference, J&J Maintenance requested the contracting officer to reconsider his decision not to set aside the procurement for small business. On April 4, FKW also requested the contracting officer to reconsider his decision based on the small business attendance at the pre-proposal conference. However, on April 12, the contracting officer responded that, at the time of his determination and based on the previous solicitation, there had been no reasonable expectation that two responsible small businesses would submit offers. He further stated that "[a]t this point in time several firms have put a lot of effort into their solicitation preparation and it would not be equitable to change the solicitation status." He then determined to continue the procurement on an unrestricted basis.

The protester asserts that the agency's reliance on information collected over 4 years ago does not justify the decision not to set aside this procurement. We agree.

The record indicates that the agency decision not to set aside was based exclusively on a single solicitation issued

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<sup>1/</sup> The revised closing date for receipt of proposals was May 7, 1989.

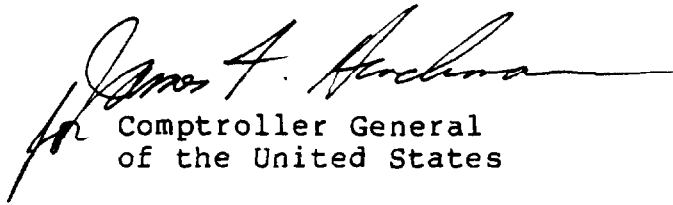
4 years ago. While the FAR provides that past acquisition history is always important, the FAR also states that it is not the only factor to be considered in determining whether a reasonable expectation of obtaining two small business offers exists. See FAR § 19.502-2. The agency failed to consider the fact that in response to the CBD notice, 14 small business firms expressed interest in the procurement. Despite this small business interest, the agency neither conducted a market survey nor investigated the ability to perform the proposed contract of those small businesses that expressed interest in the procurement. Under these circumstances, especially given the number of small business firms that showed an interest in this procurement, we think the contracting officer acted unreasonably in determining, based solely on the outdated procurement history, that there was no reasonable expectation that offers from at least two responsible small business concerns would be received, without at least investigating the interest demonstrated.

The agency also argues that at the time FKW requested that the procurement be set aside (after the issuance of the solicitation), several firms had expended considerable effort toward responding to the solicitation and that it would have been inequitable to change the solicitation status at such a late stage.

The record shows that the agency knew or should have known of considerable small business interest prior to issuance of the solicitation since 14 of the 50 firms responding to the CBD notice of December 20, 1988, indicated that they were small businesses. The agency has not explained why these small business responses did not put the contracting officer on notice of small business interest prior to solicitation issuance. Rather, the agency, in its report, simply ignores this fact.

The protest is sustained. By separate letter to the Secretary of Health & Human Services, we are recommending that the contracting officer investigate the responsibility of the small business firms that have expressed interest in the procurement, and if two responsible small business concerns show sufficient interest (and if award can be made at a reasonable price), the solicitation should be amended to set aside the procurement for small business. We also

find that FKW is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1988).

  
Comptroller General  
of the United States